

**SANITIZED DECISION – DOCKET NO. 04-776 U – ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on JUNE 3, 2005 – ISSUED on NOVEMBER 30, 2005**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX – BURDEN OF PROOF MET – By tying general ledger entries on which the Tax Commissioner seeks to assess tax to specific invoices from the vendor which demonstrate that the consumers’ sales and service tax has been paid, the taxpayer has satisfied its burden of proof with respect to those specific general ledger entries.

FINAL DECISION

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner. Thereafter, on October 19, 2004, the Director of the Division issued a purchasers’ use tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of January 1, 2000, through August 31, 2003, for tax in the amount and interest in the amount computed through September 30, 2004, for a total assessed tax liability. The Commissioner did not assess any additions to tax. Written notice of this assessment was served on the Petitioner.

Thereafter, on December 22, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner owned and operated three restaurants in the area, pursuant to a license for each restaurant. All restaurants were located in different areas of the state.

2. In opening the three restaurants, the Petitioner purchased a substantial amount of equipment and supplies from a certain restaurant equipment company, the equipment sales affiliate of the restaurants.

3. The Commissioner's assessment was based, in part, on an estimate of purchases on which consumers' sales and service tax was not paid, which were prorated over the period of the assessment.

4. The Commissioner's assessment was also based on a limited number of specific, identified purchases which, in terms of dollars expended, tended to be larger.

5. The only amounts on which the Commissioner sought to assess purchasers' use tax, to which the Petitioner raises any challenge, are two separate entries shown on the Petitioner's general ledger.

6. The first general ledger entry was dated March 14, 2001, and consisted of a payment to the restaurants, with respect to which the audit workpapers give no indication that consumers' sales and service tax was paid. *See* State's Exhibit No. 1, Schedule D, Page 1 of 2.

7. The second general ledger entry was dated March 30, 2001, and consisted of a payment to the restaurants, with respect to which the audit workpapers give no indication that consumers' sales and service tax was paid. *See* State's Exhibit No. 1, Schedule D, Page 1 of 2.

8. At the hearing, the Petitioner presented a copy of its general ledger, which had some handwritten notations which are not relevant to the issues presented herein.

9. Subsequent to the hearing, at the request of the undersigned administrative law judge, the Petitioner presented a clean copy of its general ledger. *See* Petitioner's Exhibit No. 5, pp. 2 & 11-24.

11. The Petitioner's general ledger shows the two purchases picked up by the Tax Commissioner and taxed by him. *See* Petitioner's Exhibit No. 5, pp. 2 & 11.

12. The two purchases picked up and taxed by the Tax Commissioner, as shown on the general ledger, show the reference "Master 17798." *See* Petitioner's Exhibit No. 5, pp. 2 & 11.

13. The Petitioner received two invoices from the restaurant equipment company, the equipment sales affiliate of the restaurant, one dated April 16, 2001, and the other dated April 23, 2001, each of which bears Master No. 17798. *See* Petitioner's Exhibit No. 2, pp. 7-12, and Petitioner's Exhibit No. 5, pp. 3-8.

14. The two invoices, one in the amount and the other in the amount, totaling, show that the Petitioner made a substantial purchase from the restaurant equipment company.

15. These invoices show that the restaurant equipment company charged consumers' sales and service tax on the full amount of the items listed in the invoice.

16. The Petitioner has presented a reconciliation, by which it attempts to show how the invoices and credit memos presented by it are reflected in the payments and credits shown in its general ledger. *See* Petitioner's Exhibit No. 5, p. 1.

17. According to the reconciliation, the Petitioner was billed for the two invoices in April, 2001, and was credited with returns in the amount, resulting in a net cost to the Petitioner.

18. According to the reconciliation, the Petitioner paid, and received a credit, resulting in total payments.

19. The two invoices correspond to the two journal entries in the Petitioner's general ledger upon which the Commissioner assessed consumers' sales and service tax.

20. The Petitioner presented a credit memo dated August 22, 2001, in the amount, which a member of the Petitioner testified related to the return of items that were purchased for the Petitioner's store, but which were not used in said store and were returned to the restaurant equipment company.

21. A member of the Petitioner testified that the items were returned to the restaurant equipment company several months after they were ordered, shipped and received because it took the Petitioner several months to set up and open the store, and only then could the Petitioner determine that it did not need the items that it returned.

22. The items on the credit memo, dated August 22, 2001, do not all correspond to items that are listed on the two purchase invoices.

DISCUSSION

The issue presented by this matter is whether the Petitioner has proven that consumers' sales and service tax was paid on the purchases reflected by the general ledger entries upon which the State Tax Commissioner assessed consumers' sales and service tax. Based upon the evidence presented, it is apparent that consumers' sales and service tax was paid on those purchases.

The Petitioner's two witnesses testified that the Petitioner was in the process of opening the store at the time that both the purchases and the two ledger entries were made. The two invoices and the two general ledger entries are approximately the same amount. Both the ledger entries and the invoices refer to "Master Number 17798." This Office has little trouble concluding that the invoices and the ledger entries both reflect a single transaction. The purchases reflected by the two are one and the same.

The invoices bearing Master Number 17798 show that the vendor separately listed and collected consumers' sales and service tax and that the Petitioner paid the tax. Since those invoices are reflected in the entries in the general ledger upon which the Tax Commissioner attempts to collect consumers' sales and service tax, the tax was paid with respect to those entries. Therefore, the Petitioner has satisfied its burden of proving that it paid consumers' sales

and service tax with respect to the transaction. Stated differently, the Petitioner has demonstrated that the Tax Commissioner is attempting to collect purchasers' use tax on a transaction on the consumers' sales and service tax has already been paid.

The reconciliation presented by the Petitioner also tends to support its version of the facts. It appears that only one of the items returned pursuant to the credit memo and credited against the identified purchases was included on one of the invoices bearing Master No. 17798. It appears that the Petitioner retained the remaining items. While the returned items were credited on the Petitioner's general ledger and netted against the purchases on which the Commissioner seeks to assess tax, the Petitioner retained the items on which consumers' sales and service tax was paid.

Accordingly, it is held that the Petitioner has satisfied its burden of proving that it has paid the tax with respect to that portion of the assessment which is identified as general ledger entries bearing the dates April 16, 2001, and April 23, 2001. The Petitioner is entitled to modification of the assessment to reflect its payment of tax with respect to that portion of the assessment.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid, either in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).
2. The Petitioner has carried its burden of showing that the assessment of tax against it in this matter is erroneous with respect to the transaction reflected by the general ledger entries identified by Master No. 17798, totaling.

3. The purchasers' use tax on a purchase in the amount of \$, computed at six percent (6%) is \$, and is deleted from the assessment.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of January 1, 2000, through August 31, 2003, for tax in the amount and interest in the amount computed through September 30, 2004, for a total assessed tax liability, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax in the amount.

Interest accrued on the modified amount of purchasers' use tax from the due dates of the tax and **continues to accrue** on this unpaid tax until this liability is fully paid.

DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF TAX DUE

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter, and includes a computation of the amount of tax due based on the factual and legal determinations set forth above.

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of interest due and owing consistent with the opinion set forth above.

3. The parties shall make every attempt to reach an agreement with respect to a computation of amount of interest due and owing on the tax found due in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals, which computation of interest shall be computed through the last day of the month for which the parties compute interest.

4. If the parties are able to reach an agreement with the respect to the amount of interest due and owing, then within 45 days of service of this decision, and in accordance with 121 C.S.R. 1, § 73.1.2, the parties shall file an agreed upon computation of interest due.

5. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify the amounts or computations upon which the parties agree and those upon which they disagree.

6. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of interest due in accordance with the above-stated opinion.

7. If, after meeting in an attempt to reach an agreement with respect to the above-stated computations, the parties are unable to agree upon an amount of interest due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within 45 days of service of this opinion, either party may submit a computation of the amount of interest that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party.

8. If only one party submits a computation of the amount of interest it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2.

9. If both parties submit a computation of the amount of interest they believe is due, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their computations simultaneously) or 121 C.S.R. 1, § 73.2.2 (where one party files its computation and other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3.

10. Any computation submitted by the parties pursuant to 121 C.S.R. 1, § 73.2, shall contain such information as shall be sufficient to permit the West Virginia Office of Tax Appeals to understand how such computation of interest was arrived at by said party.

11. If, after the submission of computations of the amount of interest due by both parties, either party believes that an evidentiary hearing is necessary, within 10 days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of interest due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of interest due submitted by the parties, pursuant to 121 C.S.R. 1, §§ 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter its computation of interest due.